APPELLANT'S MEMORANDUM
IN OPPOSITION TO
APPELLEE'S MOTION TO DISMISS

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. 79-5962

DANNY VINCENT,

Appellant,

VS.

STATE OF TEXAS,

Appellee.

On Appeal From the Texas
Court of Criminal Appeals

LEMON, CLOSE, ATKINSON
SHEARER & McCUTCHEON
Robert D. McCutcheon
P.O. Box 1065
Perryton, Texas 79070

PRELIMINARY STATEMENT

Appellee, The State of Texas ("The State"), has filed its Motion to Dismiss this appeal on the grounds that Appellant, Danny Vincent ("Vincent"), "escaped from custody" during the pendency of his appeal to the Texas Court of Criminal Appeals, thereby resulting in loss of jurisdiction by the Texas Court of Criminal Appeals. The Motion to Dismiss should be overruled for the simple reason that Vincent did not "escape from custody" during the pendency of his appeal. Tex. Code Crim. Proc. art. 44.09 is therefore not applicable, and the Texas Court of Criminal Appeals did not lose jurisdiction.

The sole factual basis upon which the State of Texas relies for its factual assertion that the Defendant "escaped from custody" is the statement in a pro se "Motion for Concurrent Sentence" filed by Vincent in the state trial court without the benefit of counsel to this appeal.[1/]

As shown by the Affidavit of Sherill McLearen,[2/] agent for the appeal bondsman, Vincent left the State of Texas with the bondsman's knowledge, understanding and consent. Likewise, the prosecuting attorney and the local sheriff knew of Vincent's leaving at the time he left and consented. In fact, this was a condition of the issuance of the appeal bond. Consequently, the State's house of cards falls on the inaccuracy of its factual premise.

ARGUMENT AND AUTHORITIES

The State's entire argument is grounded upon the alleged fact that Vincent made an "escape from custody" within the meaning of Tex. Code Crim. Proc. art. 44.09. Absent an "escape from custody," the State's motion must necessarily fail.

1/ The affidavit of Robert D. McCutcheon attached hereto as Exhibit "A" reflects that he, as Vincent's Texas counsel, was not apprised of the filing until he received a copy of the notice from Vincent contemporaneously with Vincent's filing thereof.

2/ Attached hereto as Exhibit "B".

Essential to escape is the "unauthorized" regaining of a person's liberty from the authority and control of the power entitled to restrain him. Although not defined in the Texas Code of Criminal Procedure, the term "escape" is defined in the Texas Penal Code as:

> . . .unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, but does not include a violation of conditions of probation or parole. Tex. Penal Code § 38.01(3).

"Custody" is defined as being:

> . . .detained or under arrest by a peace officer or under restraint by a public servant pursuant to an order of a court. Tex. Penal Code § 38.01(2).

Clearly, Vincent was not in "custody" as defined by the Texas Penal Code. In fact, he was free from custody and under the control of the bondsman while his appeal was pending. Vincent was not:

(a) detained or under arrest by a peace officer; or,

(b) under restraint by a public servant.[3/]

Even if, by some stretch of the imagination, a bail bondsman could be considered a "public servant," Vincent's departure for Colorado was authorized, not unauthorized.

Clearly, the State's reliance upon the proposition that Vincent was "in custody" pursuant to his appeal bond is misplaced. The case of Ex Parte Trillo, 540 SW2d 728 (Tex. Crim. App. 1976) as cited by the State, involved the determination of whether an appellant was being restrained and therefore "in custody" even though he was free on personal bond for purposes of a habeas corpus challenge to confinement beyond the twenty day period allowed for filing of the motion to revoke probation. Citing Ex Parte Burt, 499 SW29 109 (Tex. Crim. App. 1973), the Texas court in Ex Parte Trillo held that the petitioner, even though he had been released from confinement from the Texas Department of Corrections, would be considered "in custody" since there was a possibility that collateral

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3/ "Peace Officer" and "Public Servant" are statutorily-defined terms. See Exhibit "C" attached hereto.

legal consequences would be imposed on the basis of the challenged conviction. The Texas court followed the holdings of this Court in Hensley v Municipal Court, 411 U.S. 345 (1973), which was grounded on the premises that such restraints on liberty were severe and immediate enough for purposes of federal habeas corpus challenge. The actual holding of Trillo was to insure that a party released on bail was not deprived of the habeas corpus remedy. The decision was also made, in part, on Tex. Code Crim. Proc. art. 11.04 which provides that every "provision relating to the writ of habeas corpus shall be most amply construed in order to give effect to the remedy and protect the rights of the person seeking relief under it."

The second case cited by the State, Moreno v State, 544 SW2d 398 (Tex. Crim. App. 1976), stands for the proposition that a mistaken release from custody puts the appellant, who had voluntarily absented himself and whose whereabouts are unknown, in the same status as an escapee, thus depriving the Court of Criminal Appeals from jurisdiction to entertain his appeal. In Copeland v State, 240 SW2d 779 (Tex. Crim. App. 1951), the appellant had given notice of appeal, but he also had failed to give recognizance and had escaped from the custody of the sheriff.

Clearly, Vincent's bondsman had the right to permit Vincent to travel to Colorado. This is especially true where the local sheriff and the State's attorney consented. The risk was on the bondsman if Vincent later "escaped" or fled. To the contrary, however, Vincent notified the bondsman of his intended place of residence. Vincent requested permission in advance to go to Colorado. None of Vincent's actions are consistent with an "escape".

Other than Vincent's pro se motion, there is nothing in the record to indicate an escape. Tex. Code Crim.Proc. art. 44.10 provides that when any such escape occurs, "the sheriff who had the prisoner in custody, shall immediately report the fact under oath to the district or county attorney in which

the conviction was had." Such report "shall be sufficient evidence of the fact of such escape to authorize the dismissal of the appeal." No such affidavit appears.[4/]

Tex. Code Crim. Proc. art. 17.16 gives a surety on a bail bond the right, at any time, to relieve itself of his undertaking ". . .by surrendering the accused into the custody of the sheriff of the county where he is prosecuted." Tex. Code Crim.Proc. art. 17.19 provides that "any surety, desiring to surrender his principal, may, upon making affidavit of such intention before the court or magistrate before which the prosecution is pending, or would obtain from such court or magistrate a warrant of arrest for such principal, which shall be executed as in other cases." No proceedings have been filed to surrender Vincent or to relieve the principal of his obligation on the appeal bond.[5/]

The State's reliance upon Vincent's pro se motion is regretful. As this Court has stated, allegations of pro se motions are held to less stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519 (1972).

In order to support a conviction for escape from jail, the State must "prove that the defendant was formally charged and in custody." Rodriguez v State, 457 SW2d 555 (Tex. Crim. App. 1970). The State's burden of proof in seeking to dismiss this appeal should not be less considering the draconian effect upon the status of Vincent's appeal.

Finally, the State requests that the case be dismissed because Vincent escaped "pending his Supreme Court appeal". Once again, the State assumes, without proving or offering any supporting evidence, that Vincent has indeed escaped pending this appeal. Clearly, Vincent was in Colorado with permission of the bondsman. The unfortunate circumstance of his being

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4/ See, Exhibit "D" attached hereto.

5/ See, Exhibit "D" attached hereto.

convicted for a subsequent crime in Colorado does not elevate authorized travel to escape. All of the cases cited by the State deal with an appellant escaping pending review by this Court. Vincent's travel to Colorado occurred prior to the institution of the appeal to this Court. As the court stated in Molinaro v New Jersey, 396 U.S. 365 (1970):

> His bail has been revoked and the State considers him a fugitive from justice.

There is nothing is this record, nor can the State cite anything in this record, by which the State considers, or could properly consider, Vincent to be an escapee or a fugitive from justice. In fact, the State consented to his leaving at the time.

Consequently, the State's effort to dismiss Vincent's appeal should fail. There was no "escape." There was no "custody." The Texas Court of Criminal Appeals did not lose jurisdiction of Vincent's appeal because of Vincent's authorized travel to Colorado with the prior knowledge and consent of Vincent's bondsman and with the knowledge and consent of the local State's attorney and sheriff.

WHEREFORE, Appellant Danny Vincent, requests that the Motion to Dismiss filed by the State of Texas be overruled in all respects.

Respectfully submitted,

LEMON, CLOSE, ATKINSON,
SHEARER & McCUTCHEON
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P.O. Box 1066
Perryton, Texas 79070
Telephone: 806-435-6544

Robert D. McCutcheon
Of Counsel

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Brief in Opposition to Appellee's Motion to Dismiss was this day placed in the U.S. Mail, postage prepaid, first class, addressed to the Honorable Douglas M. Becker and Dawn Bruner, Assistant Attorneys General of the State of Texas, Supreme Court Building, P.O. Box 12548, Austin, Texas 78711.

Dated: October 24, 1980.

Robert D. McCutcheon

AFFIDAVIT

THE STATE OF TEXAS §

COUNTY OF OCHILTREE §

I, ROBERT D. McCUTCHEON, being first duly sworn upon oath state as follows.

1. My name is ROBERT D. McCUTCHEON. I am over 18 years of age, and I reside in Perryton, Ochiltree County, Texas; I have never been convicted of a felony, and I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and that they are all true and correct.

2. I am, and have been at all times material to the facts contained in this Affidavit, appellate counsel for Mr. Danny Vincent, whose appeal is now pending before the Supreme Court of the United States in Cause No. 79-5962.

3. I was not aware that Mr. Vincent had prepared or filed, until after the same was filed and I had received a copy in the mail from Mr. Vincent, that certain "Motion for Concurrent Sentence", a copy of which is attached as Exhibit "A" to the motion of the State of Texas to dismiss Vincent's appeal before the Supreme Court of the United States.

Further Affiant sayeth not.

Robert D. McCutcheon

SUBSCRIBED AND SWORN to this 24th day of October, 1980,

Notary Public, State of Texas
My Commission Expires 9-22-198_

Notary Public in and for
Ochiltree County, Texas

My commission expires:

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EXHIBIT "A"

AFFIDAVIT

THE STATE OF TEXAS §

COUNTY OF OCHILTREE §

I, SHERILL McLEAREN, being first duly sworn upon oath state as follows.

1. My name is SHERILL McLEAREN. I am over 18 years of age, and I reside in Perryton, Ochiltree County, Texas; I have never been convicted of a felony, and I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and that they are all true and correct.

2. On July 25, 1978, I was the local agent for Mr. Ben Stokes, who issued a $12,000.00 Appeal Bond for Mr. Danny Vincent in Cause No. 1494 in the District Court in and for Ochiltree County, Texas, in the matter of the State of Texas vs. Danny Vincent, on a probation revocation appeal.

3. At the time of the issuance of said bond, Mr. Vincent and I discussed the matter of his leaving for the State of Colorado to live with a brother of his. Also, this was discussed with the Ochiltree County Sheriff and with Mr. Bill Rivers, County Attorney for Ochiltree County, Texas. The appeal bond was issued on the condition that Mr. Vincent's parents pay the bond premium and that Mr. Vincent leave Texas and go to Colorado to live with his brother. The Sheriff and Mr. Rivers agreed to this arrangement. On behalf of the bondsman, I gave him permission to go to Colorado and so notified my office. I indicated to my office on that date that Mr. Vincent would be reporting to the Borger, Texas office since he would be out of state.

4. My records reflect that Mr. Vincent left the State of Texas on August 14, 1978. My records also reflect that he left a forwarding address of 9850 North Ted Blvd., Federal Heights, Colorado, where he could be located.

5. Mr. Vincent's leaving the State of Texas and going to the State of Colorado was with the full knowledge, understanding and consent of the bondsman who had issued his Appeal Bond in the referenced case.

Further Affiant sayeth not.

Sherill McLearen
Sherill McLearen

SUBSCRIBED AND SWORN to this 24th day of October, 1980,

BETTYE WEBB
Notary Public, State of Texas
My Commission Expires 9-22-1981

Bettye Webb
Notary Public in and for
Ochiltree County, Texas

My commission expires:

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EXHIBIT "B"

EXHIBIT "C"

Tex. Penal Code art. 1.07:

(25) "Peace officer" means a person so designated by the Code of Criminal Procedure, 1965.

Tex. Penal Code art. 1.07:

(30) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if he has not yet qualified for office or assumed his duties:

(A) an officer, employee, or agent of government;

(B) a juror or grand juror; or

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy; or

(D) an attorney at law or notary public when participating in the performance of a governmental function; or

(E) a candidate for nomination or election to public office; or

(F) a person who is performing a governmental function under a claim of right although he is not legally qualified to do so.

Tex. Code Crim. Proc. art. 2.12:

The following are peace officers:

(1) sheriffs and their deputies;

(2) constables and deputy constables;

(3) marshals or police officers of an incorporated city, town, or village;

(4) rangers and officers commissioned by the Public Safety Commission and the Director of the Department of Public Safety;

(5) investigators of the district attorneys', criminal district attorneys', and county attorneys' offices;

(6) law enforcement agents of the Alcoholic Beverage Commission;

(7) each member of an arson investigating unit of a city, county or the state;

(8) any private person specially appointed to execute criminal process;

(9) officers commissioned by the governing board of any state institution of higher education, public junior college or the Texas State Technical Institute;

(10) officers commissioned by the Board of Control;

(11) law enforcement officers commissioned by the Parks and Wildlife Commission;

(12) airport security personnel commissioned as peace officers by the governing body of any political subdivision of this state that operates an airport served by a Civil Aeronautics Board certificated air carrier;

(13) municipal park and recreational patrolmen and security officers; and

(14) security officers commissioned as peace officers by the State Treasurer.

THE STATE OF TEXAS §

COUNTY OF OCHILTREE §

I, WILMA SROF, hereby certify the following:

1. I am the duly elected Clerk of the District Court in and for the County of Ochiltree, State of Texas, and as such Clerk, have custody of the records in Cause No. 1494, The State of Texas vs. Danny Vincent.

2. There is no pleading, document, instrument or letter in the record relating to revocation of Mr. Vincent's appeal bond, nor any proceedings by which the appeal bondsman sought to obtain a warrant for the attachment of Mr. Vincent to bring him before the court.

3. There is no affidavit by the Sheriff of Ochiltree County, or any other person, relating in any manner to any alleged escape by Mr. Vincent from the State of Texas, to the State of Colorado or any other place.

Respectfully submitted,

Wilma Srof

Wilma Srof, Clerk of the
District Court

EXHIBIT "D"